FILED
September 26, 2014
Court of Appeals
Division III
State of Washington

No. 314651

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL L. SHEMESH, Appellant

APPEAL FROM THE SUPERIOR COURT

OF COUNTY

THE HONORABLE JUDGE CARRIE RUNGE

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF FACTS IN REPLY

Mr. Shemesh incorporates the facts outlined in appellant's opening brief, and adds the following for clarification.

Appointed on May 5, 2010, Mr. Shemesh's attorney, Mr. Swanberg, reported on July 14, 2010 that he did not believe he had a complete file. (7/14/10 RP 10-13). On August 11, 2010, the same counsel reported to the court "I just yesterday had a chance to briefly review some of the tape that would be part of the evidence in the case with my client." (8/11/2010 RP 22).

On September 22, 2010, the court heard two issues with respect to evidentiary DVDs. First, Mr. Swanberg informed the court that Mr. Shemesh wanted a transcript from the tapes the State intended to use at trial. ((9/22/10 RP 14). Second, the State's attorney told the court that Mr. Shemesh's first attorney, Ms. Meehan, had possession of certain evidentiary DVDs and had not returned them. Id. Defense counsel told the court, to the best of his knowledge he himself had never possessed them nor had he seen them. Id. In later testimony, the same attorney clarified that *he, himself, never saw the tapes* the State referred to as "child pornography" in their entirety. (2RP 205).

Mr. Metro, the fourth trial attorney, stated that on July 6, 2011, he was having a problem viewing the evidentiary videotapes because the police department would not allow him to view them without the prosecutor being present. Defense counsel said he had to wait until everyone was available before he could see the video. (7/6/2011 RP 25-26). At that hearing defense counsel said, "…and I'm the person who said *I couldn't look at the videotape for six and a half months* without two other people being there. I signed a protection order two weeks ago. I haven't gotten a copy yet. I said I'd be over there by ten o'clock on Thursday morning." (7/6/2011 RP 27). The State's attorney did not disagree with Mr. Metro's version of events. Id. In later testimony, Mr. Metro again stated that his understanding was that he could view the evidentiary DVDs *only* in the presence of the prosecutor and a law enforcement official. (2RP 256). Despite the state's attorney encouraging Mr. Metro to just "go over there on your own. Don't wait or me" defense counsel had not done so by the date of the 7/6/2011 hearing.

II. ARGUMENT

Mr. Shemesh stands on the facts and authority presented in appellant's opening brief: his constitutional right to a speedy trial was violated by the systemic breakdown in the public defender's

office. Attorneys were assigned and replaced without any regard for the posture of the case, but rather as a matter of convenience for the public defender's office. The one attorney Mr. Shemesh requested the court replace was his third appointed attorney, who over the course of 5 months had never even seen the entirety of the compiled evidence used to prosecute Mr. Shemesh.

1. The Trial Court Erred When It Failed To Enter The Mandatory Written Findings of Fact and Conclusions of Law.

Since the appellant's opening brief was filed on April 14, 2014, the Washington State Supreme Court accepted review and heard oral argument on the mandatory requirement for a trial court to enter written findings of fact and conclusions of law per RCW 9.94A.535. (Date of oral argument: September 16, 2014, *State v. Friedlund,* Supreme Court no. 899266 and *State v. Volk,* Supreme Court no. 90005-1). The outcome of those cases is undetermined.

The appellate court reviews *de novo* whether the trial court's reasons for imposition of the exceptional sentence are substantial and compelling. RCW 9.94A.585. Whether a sentence is justified is a two-part analysis: First, whether the court based the sentence on factors necessarily considered by the legislature in establishing the standard range; and second, whether the crime(s) for which a

defendant has been convicted are so distinguished from other crimes within the same statutory definition that an exceptional sentence is justified. *State v. Jones,* 59 Wn.App. 744, 801 P.2d 263 (1990); *State v. Alexander,* 125 Wn.2d 717. 725, 888 P.2d 1169 (1995). Additionally, without the written findings and conclusions, the appellant cannot assign error and the appellate court cannot properly review whether the trial court erred in its conclusion or abused its discretion in imposing a clearly excessive term of incarceration. RCW 9.94A.585.

In *Chambers,* the Supreme Court held that a judgment and sentence is invalid on its face if the trial court has not entered written findings of fact and conclusions of law for an exceptional sentence under RCW 9.94A.535. *State v. Chambers,* 176 Wn.2d 573, 583, 293 P.3d 1185 (2013). An oral opinion by the trial court is an informal opinion with no binding effect unless and until it is formally incorporated into findings of fact and conclusions of law. *State v. Head,* 136 Wn.2d 619, 964 P.2d 1187 (1998). In the Section 2.4 of the judgment and sentence, there are typewritten "x"s in the preprinted form. And, despite the preprinted sentence "Findings of fact and conclusions of law are attached in Appendix 2.4," there is no Appendix 2.4. (CP 560).

Mr. Shemesh respectfully submits that under Washington law, the judgment and sentence is invalid on its face. He asks this Court to remand for entry of the exceptional sentence findings of fact and conclusions of law and to order supplemental briefing as in the usual course of things. *State v. Hyder,* 159 Wn.App. 234, 244 P.3d 454 (2011); *State v. Hale,* 146 Wn.App. 299, 189 P.3d 829 (2008); *In re Breedlove,* 138 Wn.2d 298, 979 P.2d 417 (1999).

III. CONCLUSION

Based on the foregoing facts and authorities, and the facts and authorities incorporated by reference in appellant's opening brief, Mr. Shemesh respectfully asks this Court to reverse his conviction. Alternatively, Mr. Shemesh asks this Court to remand for written findings of fact and conclusions of law as required by statute and order supplemental briefing on the exceptional sentence issue.

Respectfully submitted this 26th day of September, 2014.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury in the State of Washington, that on September 26, 2014, I served as indicated by electronic mail, per prior agreement between the parties, or mailed first class, postage prepaid, a true and correct copy of appellant's reply brief, to the following:

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